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**This Opinion is Not  
Citable as Precedent  
of the TTAB**

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Mosaicorp, Inc.

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Serial No. 75555146

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David P. Cooper of Kolisch Hartwell, P.C. for Mosaicorp, Inc.

Jennifer M.B. Krisp, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

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Before Hairston, Rogers and Drost,  
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Mosaicorp, Inc. has filed an application to register ZIVA as a trademark in Class 3 for certain beauty products, and as a service mark in Classes 35 and 42 for, respectively, certain retail store services and certain beauty salon services.<sup>1</sup> The application is based on

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<sup>1</sup> The final identifications, as ultimately amended from the original identification of "beauty related goods and services," reads as follows:  
Class 3—Beauty-related goods, namely, cosmetics, hair care products, namely, shampoos, conditioners and gels, skin and nail care products, namely, nail polishes, nail polish removers;

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applicant's statement of its bona fide intention to use the mark in commerce on or in conjunction with the identified goods and services.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with the identified goods and services, will be likely to cause confusion or mistake or to deceive consumers, in view of the prior registration of the mark ZEVA for "personal care preparations, namely, non-medicated hair care preparations, skin lotion, skin soap, facial moisturizer, make-up and nail preparations," in Class 3, "manicure implementations, namely, nail care files," in Class 8, and "retail store services featuring beauty and personal care products," in Class 35.<sup>2</sup>

When the refusal was made final, applicant appealed. Both applicant and the examining attorney have filed briefs, but an oral hearing was not requested.

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Class 35—Retail store services featuring hair cutting tools, coloring and styling products, manicure and pedicure products, skin care products, and massage products; and Class 42—Beauty salon services, namely, hair cutting, coloring and styling, manicure and pedicure, skin care and massage.

<sup>2</sup> Registration No. 2,269,066, issued August 10, 1999 to Rodich Enterprises Limited. The registration asserts October 15, 1995 as the date of both first use of the mark and first use of the mark in commerce.

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Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, two key considerations are the similarities of the marks and the relatedness of the goods and services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The examining attorney argues that the marks differ in only one vowel and therefore are nearly identical in appearance and spelling. Further, she contends, they may be pronounced exactly the same, both because the different vowels can be articulated to make the same sound and because, under accepted legal analysis of cases such as this, there is no presumptively correct way to pronounce a mark and we must consider that they would be pronounced the same by prospective consumers.

Applicant contends that the marks are different in sight, sound and meaning and that, in any event, registrant's mark is weak because of frequent registration of "four-letter marks beginning with Z and ending in A for beauty-related services." Brief, p. 3. In support of the

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latter point, i.e., the asserted weakness of the mark in the cited registration, applicant relies on a list of 21 third-party registrations or applications.<sup>3</sup>

As for the involved goods and services, the examining attorney essentially contends that the respective retail services are legally identical, insofar as registrant's "retail store services featuring beauty and personal care products" is a broadly worded identification and would encompass applicant's more specific "retail store services featuring hair cutting tools, coloring and styling products, manicure and pedicure products, skin care products, and massage products." The examining attorney also contends that registrant's goods are closely related to applicant's other goods and services, insofar as they are complementary beauty products and services. Applicant, in contrast, contends only that "Applicant's mark is used on goods that are sold in the beauty salon industry, an industry very different from the retail store services in

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<sup>3</sup> Specifically, in its second request for reconsideration and in its appeal brief, applicant relies on 18 registrations and three applications. Applicant has not provided any information on the status of any of the 18 registrations. As for the applications, it acknowledges that one has been abandoned, one has been published for opposition and one is "pending." In an earlier response to an office action, applicant had also relied on certain state registrations or applications. It did not list these in the second request for reconsideration or in its appeal brief and we consider applicant to no longer rely on them.

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which Registrant's goods are apparently sold." Brief, p. 7.

We agree with the examining attorney that the marks are virtually identical. Specifically, they would likely be pronounced the same by many prospective consumers of the involved products and services, and such consumers might easily overlook the one-vowel visual difference between ZIVA and ZEVA. See Barton Mfg. Co. v. Hercules Powder Co., 88 F.2d 708, 33 USPQ 105, 107 (CCPA 1937) (no "correct" pronunciation of a mark), and In re Microsoft Corp., 68 USPQ2d 1195, 1199 (TTAB 2003) ("we believe the examining attorney is correct in observing that it is impossible to control how consumers will pronounce marks"). See also Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972) ("[s]ide-by-side comparison is not the test. The focus must be on the 'general recollection' reasonably produced by appellant's mark and a comparison of appellee's mark therewith.") (citation omitted).

Further, the examining attorney is correct in her statement that applicant has made nothing of record to show that either mark has a recognized meaning, much less to show that they have different meanings. Accordingly, we find registrant's mark an arbitrary mark, not a weak mark,

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and entitled to a normal scope of protection. Even if we were to accept applicant's unsupported contention that the marks have dissimilar connotations, we still would find them similar, for likelihood of confusion purposes, because of their nearly identical appearance and pronunciation.

See Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (TMS and TMM found to look and sound alike and to create likelihood of confusion even among discriminating purchasers of expensive software systems), and Spoons Restaurants, Inc. v. Morrison, Inc., 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992) (likelihood of confusion found when marks looked and sounded alike, even though they arguably might have different connotations, in part because of fallibility of customer memory).

Finally, applicant's asserted evidence of weakness of the registered mark is ineffective and does not establish that it should be accorded a narrow scope of protection. Applicant offered only a list of registrations and applications. The examining attorney correctly objected to such evidence, noting that third-party registrations are properly put into the record by submitting copies of the same, not by mere list. Nonetheless, the examining attorney conceded that the list could be considered and

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concluded that it does not support the stated proposition of applicant that there are many "four-letter marks beginning with Z and ending in A for beauty-related services." We agree that it does not support the proposition advanced by applicant, for the list includes only one registration meeting applicant's specification, specifically, the purported registration of ZIBA for cosmetics (identification provided by applicant in its list). Even if we go beyond applicant's own specification of "four-letter marks," and consider multiple word marks that include a four-letter term beginning with Z and ending with A, we find only two additional marks that meet the more generous test: SALON ZIBA for hair dressing salons (applicant's identification) and ZIMA HAIR (no identification provided).<sup>4</sup> As already noted, we consider the registered mark arbitrary and strong, and applicant's list of third-party registrations does not alter our conclusion on this point.

Perhaps the most important proposition regarding the marks to keep in mind is that marks need not be as close, for a likelihood of confusion to be found, when they will

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<sup>4</sup> The abandoned intent to use application for ZEVA NATURAL NAILS cannot be probative on the question of the purported weakness of the registered mark. Moreover, Office records show that application to have been filed by the owner of the cited registration.

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be used on or in conjunction with legally identical goods and services. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) ("When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.").

Turning, then, to the goods and services, applicant has not discussed them with any degree of specificity or addressed the points made by the examining attorney's explanation of why they overlap, in part, and are otherwise related. Rather, applicant included a one-sentence argument that applicant and registrant employ different channels of trade.

We agree with the examining attorney that registrant's broadly identified "retail store services featuring beauty and personal care products" must be read to encompass applicant's more specifically identified "retail store services featuring hair cutting tools, coloring and styling products, manicure and pedicure products, skin care products, and massage products." The respective identifications of Class 3 products also overlap, as registrant's identification includes "non-medicated hair care preparations" while applicant's includes "hair care products, namely, shampoos, conditioners and gels," and



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registrant's identification includes "nail preparations" while applicant's includes "nail polishes, nail polish removers." See In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) ("Indeed, the second DuPont factor expressly mandates consideration of the similarity or dissimilarity of the services as described in an application or registration") (internal quotation marks omitted).

Given that the involved marks are virtually identical and that the Class 3 products and Class 35 retail store services of applicant and registrant overlap, we conclude that a likelihood of confusion exists as to each of these classes. The only remaining question then, is whether there would be a likelihood of confusion if applicant's mark were to be used for its Class 42 "beauty salon services, namely, hair cutting, coloring and styling, manicure and pedicure, skin care and massage."

The cited registration does not include beauty salon services generally or any of the more specific services listed in applicant's identification of beauty salon services. The examining attorney has concluded, and argued, that there is a "generally known and recognized" practice for beauty salons to "provide, on the very same premises, the service of providing beauty and personal care

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products for retail sale." Brief, p. 9. Earlier, the office actions refusing registration included similar general statements about the relatedness of applicant's beauty salon services and the products and services of registrant, e.g., "registrant and applicant both provide beauty and health care products, and services in this same field." Final refusal, p. 2. The examining attorney did not, however, put anything into the record to establish either the presumed fact that beauty salons are involved in the retail sale of beauty and personal care products or the implied fact that, if they do so, they provide their salon services and sell products under the same mark.<sup>5</sup> Even if we were to take judicial notice that beauty salons are engaged in the retail sale of beauty and personal care products, we would not find it appropriate to take judicial notice of that salon services and the products they sell are typically offered under the same mark.

We find that the examining attorney has not carried her burden of showing the relatedness of applicant's beauty salon services and registrant's products or retail store services, such that we can conclude that there is a

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<sup>5</sup> A common means for showing a propensity for different but related products and services to be marketed under the same mark is to offer into the record registrations showing that a mark has been registered for such varying products and services. See,

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likelihood of confusion. See La Maur, Inc. v. The Bagwells Enterprises, Inc., 199 USPQ 601 (TTAB 1978) (opposition to application seeking to register THE VOGUE STYLON for beauty salon services, based in part on registration of STYLON for hair fixative or setting lotion, dismissed).

Decision: The refusal of registration is reversed as to applicant's Class 42 beauty salon services. The refusal of registration under Section 2(d) of the Lanham Act is affirmed as to applicant's Class 3 products and its Class 35 retail store services.

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e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).